No. 10-122

In the Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
MARK A. MELNICK
BRIAN M. SIMKIN
TIMOTHY P. MCILMAIL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the trial court's denial of bad-faith attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b).

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 4a-5a) is not published in the *Federal Reporter* but is reprinted in 356 Fed. Appx. 415. The order of the Court of Federal Claims (Pet. App. 6a-20a) regarding attorney fees is reported at 85 Fed. Cl. 241.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2009. A petition for rehearing was denied on March 22, 2010 (Pet. App. 1a-3a). On June 9, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 20, 2010, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1980s, the United States Army Corps of Engineers (Army) awarded to petitioner a series of long-term contracts concerning a 400-unit Army housing project at Fort Wainwright, Alaska. Pet. App. 27a. The parties initially "enjoyed a positive working relationship." *Id.* at 46a. Beginning in the mid-1990s, however, several disputes arose concerning the parties' contractual obligations. *Id.* at 48a-49a; see *id.* at 48a-87a. Petitioner sought relief under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, by submitting certified claims to designated contracting officers.

2. In 1998, petitioner filed this contract action in the Court of Federal Claims (CFC). Pet. App. 87a. In April 2002, petitioner updated and amended its complaint. *Id.* at 88a. The CFC tried the case and, in April 2007, issued an opinion. *Id.* at 24a, 89a.

a. The CFC's April 2007 opinion resolved most of petitioner's claims. Pet. App. 24a-191a. *Inter alia*, the court concluded that certain Army representatives had breached the government's covenant of good faith and fair dealing under petitioner's contracts by taking actions calculated to hinder petitioner's contract performance. *Id.* at 106a-107a, 115a-157a. The court stated that petitioner was "not entirely blameless in this matter," but it concluded that petitioner's shortcomings did not justify the officials' bad-faith response. *Id.* at 181a.

The CFC also concluded that certain Army officials had attempted to undermine the impartiality of the contracting officers who handled petitioner's administrative CDA claims. Pet. App. 157a-168a. The court found that

the contracting officer from 1997 to 2001 (Dennis Klein) had not been influenced by pressure from those officials. *Id.* at 161a-163a; cf. *id.* at 52a. The court concluded, however, that the contracting officer who arrived in early 2002 (Harold Hopson) had failed properly to perform his duties in certain respects, and that the officer had thereby facilitated the underlying "breach of the covenant of good faith and fair dealing" by failing "to address the bad faith exhibited by other officials." *Id.* at 165a, 167a-168a; see *id.* at 162a-165a & n.70; cf. *id.* at 74a.

Petitioner sought more than $12.5 million in damages, see Pet. App. 96a n.29 (listing petitioner's pre- and post-trial damage claims), and the CFC rejected most of its claims. *Inter alia*, the court rejected petitioner's claim for $8.6 million in alleged damage to the value of the housing project, *id.* at 169a-178a, and it denied most of petitioner's claims to $2.5 million in other various expenses, *id.* at 179a-181a. The CFC remanded one issue concerning contract "incentive fee[s]" to the Army for redetermination. *Id.* at 183a; see *id.* at 144a-148a; see 5/25/2007 Order (clarifying scope of remand).[1]

b. In April 2008, after the Army completed its remand proceedings, the CFC entered a $241,755 final judgment in petitioner's favor. Pet. App. 21a-23a. That judgment awarded petitioner $218,553 in additional incentive fees from 1998-2001; $15,695 for damage caused by a fire in one housing unit; and $7506 for erroneous

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[1] Although the CFC stated that petitioner was "entitled to declarations" regarding certain issues, Pet. App. 182a, the court never entered a declaratory judgment concerning those issues.

rent reductions from 2002. *Id.* at 21a-22a. The government did not appeal from that judgment.[2]

3. a. Petitioner subsequently moved for an award of attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. EAJA includes two separate provisions authorizing attorney fees awards against the United States. See 28 U.S.C. 2412(b) and (d). Petitioner invoked the first of those provisions, Section 2412(b), which as relevant here provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States * * * in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law.

28 U.S.C. 2412(b). Because Section 2412(b) makes the United States liable for attorney fees "to the same extent" as a private litigant "under the common law," the so-called American Rule—under which "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975)—will typically preclude a fee award against the United States under Section 2412(b).

The American Rule, however, is subject to three "narrowly defined" exceptions. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (citation omitted). Under the exception on which petitioner relies, a federal court possesses "inherent power to police itself" by "assess[ing]

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[2] Separate contracting officer decisions have awarded more than $1 million in contract claims in petitioner's favor. Cf. Pet. 7.

attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 45-46 (quoting *Alyeska Pipeline*, 421 U.S. at 258-259). The "underlying rationale" of the "bad-faith exception to the American rule" is "punitive" and is premised upon "vindicat[ing] the District Court's authority over a recalcitrant litigant." *Id.* at 53 (citations omitted). "[T]he imposition of sanctions under the bad-faith exception" at common law thus "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Ibid.*

b. The CFC denied petitioner's motion for EAJA fees. Pet. App. 6a-20a. The court explained that petitioner based its fee request on allegations of bad-faith conduct by (1) a government attorney who had assertedly "exhibited bad faith in the conduct of this litigation" and (2) Army officials who had purportedly "corrupted the [agency's] claim resolution process" by "coercing the contracting officers into denying various contract claims filed by [petitioner]." *Id.* at 10a-11a. The court concluded that neither of those contentions provided a sound basis for a fee award. *Id.* at 11a-20a.

First, the CFC rejected petitioner's argument that the court should award fees based on alleged bad-faith conduct by government counsel during the litigation itself. Pet. App. 11a-13a. Petitioner contended that a specific government attorney had "exhibited bad faith in the conduct of this litigation," both in advising Army officials and in "triggering, or at least promoting, a criminal investigation of [petitioner's] conduct." *Id.* at 11a. The court explained that it had made no finding of bad-faith attorney conduct with respect to either of those aspects of the litigation, *id.* at 11a, 13a, and that petitioner's allegations therefore "lack[ed] the factual

predicates necessary to bring [them] within the bad faith exception to the American Rule," *id.* at 13a.

Second, the CFC rejected petitioner's argument that fees were appropriate because Army officials had "corrupted the administrative claim process." Pet. App. 13a-20a. The court explained that, although the agency claim process "was conducted in bad faith," that improper conduct neither "directly impacted the integrity of the judicial process" nor caused petitioner to incur additional litigation expenses. *Id.* at 18a-19a.

The CFC held that bad-faith fees are not available for a "defendant's bad faith response to a claim for relief after the claim accrues but before the judicial process is formally invoked." Pet. App. 14a (quoting *Centex Corp.* v. *United States*, 486 F.3d 1369, 1372 n.1 (Fed. Cir. 2007)); see *id.* at 13a-17a. The court stated that the Federal Circuit had "left open [this] question" in *Centex*. *Id.* at 13a. The court reasoned, however, that a federal court's "inherent authority" to sanction litigants "is highly limited and exists only to the extent necessary to ensure the proper functioning of the court." *Id.* at 17a. The CFC accordingly determined that the inherent judicial power to award fees should not be used to "punish[] prelitigation conduct that does not significantly impact the integrity of the proceedings before [the court]." *Id.* at 18a.

The CFC further observed that its own merits decision in this case had "rejected much of the relief originally requested by [petitioner] in its [administrative] CDA claims," including "the most dollar-intensive [portion] of its claims." Pet. App. 19a. With respect to "the claims that [the CFC] sustained," the court found no basis for concluding that the government's defense of the agency's decisions was improper. *Ibid.* The court

reasoned that "many, if not all of [petitioner's] claims would have been denied—and, in some instances, should have been denied—even in a perfectly fair [administrative] process." *Id.* at 18a-19a. Based on its view that "virtually all of the claims here would have been denied even in a 'good faith process,'" the CFC held that petitioner could not have "avoided this action and the significant expenditure of judicial resources it entailed" even if no bad-faith conduct had occurred. *Id.* at 19a.

3. a. On appeal, the government identified multiple bases for affirming the denial of attorney fees, two of which are relevant here. First, the government argued that a court's inherent authority to direct a litigant to pay attorney fees as a sanction for bad-faith conduct is based solely on the court's authority to protect its own proceedings. For that reason, the government contended, "a court may not shift fees based solely upon bad faith 'primary conduct'" that occurred before litigation, "that is, the conduct that forms the basis for the substantive claim for [judicial] relief." Gov't C.A. Br. 9; *id.* at 9-12. Second, the government argued that "even if fee shifting [were] available where a defendant forces a plaintiff to go to court to obtain relief," petitioner had failed to establish that it would be entitled to a fee award on that rationale. *Id.* at 13. The government relied on the CFC's finding that even if no bad-faith conduct had occurred, petitioner would not "have avoided this action and the significant expenditure" associated with it. *Ibid.* (citation omitted).

b. The court of appeals affirmed the CFC's judgment without issuing an opinion. Pet. App. 4a-5a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Under 28 U.S.C. 2412(b), the United States is liable for a prevailing party's attorney fees "to the same extent that any other party would be liable under the common law." The CFC correctly held that a private party would not be liable for fees in the circumstances presented here, and the court of appeals correctly affirmed the CFC's judgment. The CFC articulated two independent bases for denying fees. Although the court's first rationale implicates an issue of broad and continuing importance, the second is closely linked to the circumstances of this case.

a. The CFC concluded that a court's inherent power to sanction litigants does not extend to sanctions for a party's pre-litigation, bad-faith "response to [an administrative] claim for relief after the claim accrues but before the judicial process is formally invoked." Pet. App. 14a, 17a-18a. That holding reflects a sound understanding of the limited purpose that bad-faith fee awards are intended to serve. Inherent judicial powers, which arise independently of any authority conferred by rule or statute, exist because they "are necessary to the [court's] exercise of all others." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citations omitted). "Because of their very potency," this Court has emphasized that "inherent powers must be exercised with restraint and discretion." *Id.* at 44.

As with other inherent powers, the "underlying rationale" for bad-faith fee awards is a "punitive" one that enables a court to "vindicate[] [its] authority over a recalcitrant litigant." *Chambers*, 501 U.S. at 53 (citations

omitted). The court may exercise that inherent authority when a litigant either files a court action in bad faith or engages in the bad-faith "conduct of the litigation." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) (citation omitted). The exception therefore "depends * * * on how the parties conduct themselves during the litigation," not on "which party wins the lawsuit." *Chambers*, 501 U.S. at 53.

The Court in *Chambers* concluded that the sanction at issue was imposed for conduct that occurred during the litigation, see 501 U.S. at 54, and it reserved the question whether a federal court has "inherent power to sanction [a litigant] for conduct relating to the underlying [claim]" at issue in a lawsuit, *id.* at 54 n.16. The Court's explanation of the limited scope and purpose of such inherent authority suggests, however, that the inherent power to award attorney fees may be exercised only to police the conduct of litigants *after* court proceedings have begun. Consistent with that understanding, four Members of the Court in *Chambers* concluded that pre-litigation conduct cannot form the basis for an award of bad-faith fees. See *id.* at 59-60 (Scalia, J., dissenting) (concluding that because bad-faith fees can "only be imposed for litigation conduct characterized by bad faith," a litigant's "flagrant, bad-faith breach of contract" lies beyond that power); *id.* at 74 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Souter, J.) (explaining that a court's "inherent authority" does not permit it to sanction "prelitigation primary conduct" because a "court's inherent authority extends only to remedy abuses of the judicial process"). Vesting courts with inherent authority to sanction litigants for conduct taken *before* a court action has begun would untether that exercise of inherent authority from its *raison d'etre*

and would unduly penalize parties for mounting a good-faith (and potentially winning) defense in court to legal claims based on such pre-litigation conduct. If such exemplary sanctions are awarded, they must be awarded as a form of punitive damages under the substantive law concerning the claims at issue.

b. The CFC also concluded that, even if Army officials had not engaged in bad-faith conduct during the agency's CDA claim process, petitioner would not "have avoided this action and the significant expenditure of judicial resources it entailed." Pet. App. 19a. The CFC explained that the relevant sequence of events "suggest[ed] that virtually all the claims here would have been denied even in a 'good faith' process." *Id.* at 18a-19a. Even assuming *arguendo* that "bad faith misconduct outside of court proceedings [is not] categorically exempt from an award of attorneys' fees under the 'bad faith exception' to the 'American Rule'" (Pet. i), petitioner's failure to demonstrate a causal link between the relevant bad faith and the fees it ultimately incurred would provide an independently sufficient basis for the CFC's denial of fees here. That fact-bound aspect of the CFC's decision implicates no legal issue of continuing importance that might warrant this Court's review.

2. a. Petitioner contends (Pet. 20-22) that the judgment below conflicts with four decisions of this Court. Petitioner's reliance on those decisions is misplaced.

In *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), the Court emphasized that it "d[id] not have" before it a typical request for an award of "counsel fees and other expenses entailed by litigation." *Id.* at 530 (citation omitted). Rather, the question in *Vaughan* "concern[ed] damages" that may be awarded in admiralty for the "necessary expenses" of a seamen's claim of "mainte-

nance and cure." *Ibid.* (citation omitted). The "shipowner's liability for maintenance and cure," the Court explained, is "among 'the most pervasive' of all." *Id.* at 532 (citation omitted). In that specific context, the Court held that exemplary damages to compensate a seamen for his counsel fees may be awarded to punish a shipowner for its "callous," "willful and persistent" failure to provide what it "plainly owed [the seaman] under laws that are centuries old." *Id.* at 530-531. This Court accordingly has read *Vaughan* to authorize a form of "punitive damages" as a matter of substantive admiralty law. *Atlantic Sounding Co.* v. *Townsend*, 129 S. Ct. 2561, 2571 & n.5 (2009); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). And although the Court in *Vaughan* confronted pre-litigation acts the offensiveness of which is comparable to the sort of egregious litigation conduct warranting bad-faith fees, *Vaughan* does not itself support the view that courts generally may award attorney fees solely for a party's pre-litigation conduct.

Petitioner's reliance (Pet. 20) on dictum in *Hall* v. *Cole*, 412 U.S. 1 (1973), is likewise misplaced. The Court in *Hall* stated "that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Id.* at 15. But the Court did not decide whether bad-faith fees were warranted; it instead held that the "'common benefit' rationale" (another exception to the American Rule) justified a fee award. *Ibid.* Moreover, *Hall*'s dictum concerning "actions that led to the lawsuit" is far from clear, and may simply reflect that sanctions may be imposed "where the action is filed in bad faith." See *Roadway Express, Inc.*, 447 U.S. at 766 (citing *Hall*, 412 U.S. at 15).

Sullivan v. *Hudson*, 490 U.S. 877 (1989), also does not support petitioner's position. The Court in *Hudson* construed the phrase "civil action * * * for judicial review of agency action" in EAJA's other fee-shifting provision, 28 U.S.C. 2412(d)(1)(A), and concluded that such a civil action can include "remand proceedings before the [agency]" in certain Social Security cases where such proceedings are "intimately tied to the resolution of the judicial action." 490 U.S. at 884, 887-888; see *Shalala* v. *Schaefer*, 509 U.S. 292, 299-300 (1993) (explaining that *Hudson* is "limited to a 'narrow class of qualifying administrative proceedings'" in which the district court remands for further agency proceedings pending the court's entry of final judgment) (quoting *Melkonyan* v. *Sullivan*, 501 U.S. 89, 97 (1991)). That ruling has no application to Section 2412(b), particularly because the agency proceedings in which the government acted in bad faith here ended long before the CFC ordered a limited remand in this case.

Finally, contrary to petitioner's contention (Pet. 21), the court of appeals' disposition of this case does not conflict with this Court's summary affirmance without opinion in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972) (per curiam). A "summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review," *Zobel* v. *Williams*, 457 U.S. 55, 64 n.13 (1982), and is of little precedential force even with respect to "the precise issues necessarily presented and necessarily decided." *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 897 n.2 (1985) (citation omitted); see *Hohn* v. *United States*, 524 U.S. 236, 259-260 (1998) (Scalia, J., dissenting) (such dispositions "carr[y] little more weight than denials of certiorari"). Petitioner itself notes (Pet.

21) that the district court in *Amos* ruled on alternative grounds, and petitioner makes no attempt to show that this Court in *Amos* "necessarily decided" the question presented here.

b. Petitioner contends (Pet. 11-20) that the court of appeals' judgment implicates a three-way circuit split that warrants resolution by this Court. Petitioner relies in part on decisions of the D.C., Fourth, and Eleventh Circuits, which, in petitioner's view, "broadly hold" that attorney fees may be awarded for "bad faith conduct that gives rise to a plaintiff's substantive claim that the defendant violated a clear duty." Pet. 13. Contrary to that contention, the decisions that petitioner cites do not reflect such a "broad" holding. In *Nepera Chemical, Inc.* v. *Sea-Land Service, Inc.*, 794 F.2d 688, 702 (1986), the D.C. Circuit affirmed the *denial* of bad-faith fees. In *American Hospital Ass'n* v. *Sullivan*, 938 F.2d 216, 219-220 (D.C. Cir. 1991), the court approved an attorney-fee award for bad-faith conduct concerning the "[district] court's Stipulation and Order." *Id.* at 220 (citation omitted); see *id.* at 218. If parties agree to a consent order to settle a dispute, subsequent bad-faith conduct concerning that order may well be subject to sanction. But that exercise of inherent judicial power in the context of ongoing judicial proceedings lends no support to petitioner's fee request based on wholly pre-litigation conduct.

Petitioner notes (Pet. 16) that the Fourth Circuit "long ago" concluded that a "defendant's primary conduct underlying [a] claim" may support bad-faith fees. The Fourth Circuit in 1963 appears to have directed the award of attorney fees as an "equitable remedy" in a school desegregation case where the school system evidenced a "pattern of evasion and obstruction." *Bell* v.

School Bd., 321 F.2d 494, 500 (1963). But *Bell* was decided more than a decade before this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which rejected the use of such "equitable powers" as inconsistent with the American Rule. See *id.* at 241. Since that time, the Fourth Circuit has never cited *Bell* to support the award of fees for bad-faith conduct before a suit was filed, and petitioner provides no reason for believing that *Bell* remains good law after *Alyeska Pipeline*. Cf. *Williams* v. *Professional Transp. Inc.*, 294 F.3d 607, 611, 614 (4th Cir. 2002) (reversing bad-faith fee award based on conduct concerning settlement agreement executed to resolve pending litigation before the court).

Maritime Management Inc. v. *United States*, 242 F.3d 1326 (11th Cir. 2001) (per curiam), is inapposite. In *Maritime Management*, the court approved a bad-faith fee award for the government's "filing an incomplete administrative record" in district court in order to "purposefully withh[o]ld negative documents." *Id.* at 1335 & nn.13, 15; see *id.* at 1328-1329 (government submitted and certified in district court "what it characterized as 'the entire Administrative Record'" but later "admitted" that the record was incomplete) (citation omitted). The award was thus supported by bad-faith conduct during the litigation itself.

c. Petitioner argues (Pet. 16-19) that decisions from the Second, Fifth, Sixth, Eighth, and Ninth Circuits show that those courts would conclude that bad-faith fees are available in this case "because the government's [pre-litigation] misconduct compelled petitioner to pursue its claims administratively and in the [CFC]." Petitioner is incorrect.

Several of the decisions that petitioner cites hold that a bad-faith fee award "may not be based on a party's conduct *forming the basis* for [the plaintiff's] substantive claim." *Sanchez* v. *Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (holding that malicious beating by Border Patrol agent giving rise to tort claim could not justify fee award); accord, *e.g.*, *Kerin* v. *USPS*, 218 F.3d 185, 195 (2d Cir. 2000) (remanding to decide whether "decision to defend [court] action * * * was in bad faith"; stating that evidence of pre-litigation conduct may be considered when determining whether "the decision to initiate or defend a lawsuit [in court] was meritless and made for improper purposes"); *Lamb Eng'g & Constr. Co.* v. *Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1435-1437 (8th Cir. 1997) (holding that court's inherent power to assess bad-faith fees does not extend to the "bad faith administration of [a] contract" because that conduct is "pre-litigation conduct upon which the underlying [contract] claim is based"); *Association of Flight Attendants* v. *Horizon Air Indus., Inc.*, 976 F.2d 541, 548-550 (9th Cir. 1992) (finding "no federal appellate authority" for contrary position; holding that violation of statutory duty to negotiate with union could not support bad-faith fee award); *Shimman* v. *International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1231-1233 (6th Cir. 1984) (en banc) ("hold[ing] that the bad faith exception * * * does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim"; reversing fee award based on violations of labor laws), cert. denied, 469 U.S. 1215 (1985).[3] None of

[3] See also, *e g* , *SEC* v. *Zaharcas*, 374 F 3d 624, 626, 630 (8th Cir. 2004) (affirming denial of bad-faith fee award based on the government's decision to file an unsuccessful federal lawsuit because that litigation conduct was not in bad faith); *McLarty* v *United States*, 6 F.3d

those decisions supports petitioner's claim to bad-faith fees.

In holding that a bad-faith fee award "may not be based on a party's conduct forming the basis for [the plaintiff's] substantive claim," courts have occasionally suggested that bad faith "may" be found in "a party's conduct in response to a substantive claim." See, *e.g.*, *Sanchez*, 870 F.2d at 295 (dictum). The import of that observation is unclear, however, since "a party's conduct in response to a substantive claim" could include the party's conduct in the litigation itself. In any event, the statements on which petitioner relies do not reflect *holdings* that could conflict with the Federal Circuit's judgment in this case. In addition, as the CFC held, "the Army's perversion of the [administrative] claims process was an integral part of [petitioner's] argument" on the merits that the government had "breached its covenant of good faith and fair dealing." Pet. App. 19a. Such conduct forming the basis for petitioner's breach-of-contract claim would not warrant an award of bad-faith fees under the foregoing decisions.

The closest petitioner comes to identifying a square circuit conflict is petitioner's contention (Pet. 17) that the Fifth Circuit would approve bad-faith fees for misconduct in agency proceedings. Before this Court in *Chambers* articulated the principles that govern a

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545, 546, 549 (8th Cir. 1993) (affirming denial of bad-faith fee award because "the government's litigating position was substantially justified" and thus in good faith); *Perales* v. *Casillas*, 950 F.2d 1066, 1071-1073 (5th Cir. 1992) (vacating fee award and remanding for reconsideration where purported bad-faith actions were taken after class-action suit was filed in federal court and the magistrate judge concluded that government action in ongoing agency proceedings reflected a "flagrant disregard of th[e] judicial proceeding").

court's inherent authority to impose bad-faith fee awards, the Fifth Circuit approved an award of such fees for misconduct in agency proceedings that preceded district court litigation where, "after suit is filed," the agency determined that the plaintiff's claim was valid, making the "litigation in th[e] case" unnecessary. *Baker* v. *Bowen*, 839 F.2d 1075, 1082 (1988); cf. *Brown* v. *Sullivan*, 916 F.2d 492, 493-494, 496 (9th Cir. 1990) (directing bad-faith fee award for various agency actions taken *after* suit for judicial review was filed in 1981, where the district court repeatedly remanded proceedings to the agency and the agency caused "unnecessary delays" that "necessitated" additional court filings). But the rule announced in *Baker* would not aid petitioner because, as noted, the CFC concluded that petitioner would have incurred the expenses of bringing suit even in the absence of government misconduct. Unlike in *Baker*, moreover, the government defended the agency's decisions in this suit and largely prevailed in the CFC. And perhaps more importantly, the Fifth Circuit has since held in light of *Chambers* that a court's inherent authority to impose sanctions for bad-faith agency conduct does not include "the power to police the administrative courts * * * when those courts do not threaten the [district] court's own judicial authority or proceedings." *FDIC* v. *Maxxam, Inc.*, 523 F.3d 566, 593 & n.146 (2008); see *id.* at 591. Thus, any tension between the judgment below and the Fifth Circuit's pre-*Chambers* decisions would provide no basis for this Court's review.

4. Even if this Court's review were otherwise warranted to determine whether bad-faith attorney-fee awards may be premised on government misconduct in agency proceedings, this case would be an unsuitable vehicle for the Court's consideration of that issue. The

court of appeals affirmed the CFC's denial of fees without issuing an opinion. And the CFC's decision rested on two independent grounds, one of which—*i.e.*, that petitioner's claims would have been denied in the agency proceedings, and petitioner would ultimately have incurred the costs of suit, even if no government misconduct had occurred, Pet. App. 18a-19a—raises no legal issue of broad importance. See pp. 7, 10, *supra*. Thus, even if petitioner had identified a division of authority otherwise warranting review, this Court should await a case in which its resolution of the conflict would affect the outcome of the dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
MARK A. MELNICK
BRIAN M. SIMKIN
TIMOTHY P. MCILMAIL
Attorneys

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